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No. 02-1574

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner,*

v.

MICHAEL A. NEWDOW, *et al.*, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE KNIGHTS OF COLUMBUS IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS*

The Knights of Columbus respectfully submits this brief *amicus curiae* in support of Petitioner pursuant to Rule 37.3 of this Court.[1]

The Knights of Columbus is the largest Catholic laymen's organization with approximately 1.7 million members in a dozen countries. Ever since its beginnings in the basement of a church in New Haven, Connecticut, its members have understood that American concepts of freedom flow from an authority higher than the State, and that the State must respect these freedoms. *Amicus* has thus long been vigilant in defending that principle. *Amicus*, for example, underwrote the litigation in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), to make this very point and has underscored that message in a great many cases in a long and distinguished history of litigation before this Court.

Amicus has emphasized the same message before the Congress and Executive Branch as well. In fact, *amicus* has a special interest in the amendment to the Pledge of Allegiance at issue here because *amicus* played an integral role in its adoption. In 1951, the Supreme Board of Directors of the Knights of Columbus amended the Pledge of Allegiance recited at their own meetings by adding the words "under God" after "nation." *See Amendment of K. of C. for Pledge of Allegiance Adopted by Senate*, NEW HAVEN REGISTER, May 13, 1954; *"Under God" Under Attack*, COLUMBIA, Sept. 2002, at 8-9. In 1952, the Knights recommended this same action to the President, Vice-President, and members of both Houses of Congress. *See K. of C. Urged Revised Oath*, NEW YORK JOURNAL-AMERICAN, May 18, 1954.

Amicus was motivated by the same purpose as Congress would later be—to emphasize the limited nature of the American

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[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus* and its members made any monetary contributions to the preparation or submission of this brief.

Republic, bound as it is to respect the inalienable rights of its people. President Dwight D. Eisenhower recognized this motivation when he thanked the Knights of Columbus for its role in the amendment:

> [W]e are particularly thankful to you for your part in the movement to have the words "under God" added to our Pledge of Allegiance. These words will remind Americans that despite our great physical strength we must remain humble. They will help us to keep constantly in our minds and hearts the spiritual and moral principles which alone give dignity to man, and upon which our way of life is founded. For the contribution which your organization has made to this cause, we must be genuinely grateful.

Letter from Dwight D. Eisenhower to Luke E. Hart, Supreme Knight of the Knights of Columbus, Aug. 17, 1954, *reprinted in "Under God" Under Attack*, *supra*, at 9.

SUMMARY OF THE ARGUMENT

The judgment below threatens more than just the Pledge of Allegiance. It menaces as well the traditional understanding that fundamental rights must be respected by the State precisely because they are prior to the State.

This is an understanding that has been shared, since the Founding, by all three branches of the federal government. The House of Representatives Report on the joint resolution adding "under God" to the Pledge is a perfect example:

> Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp.

H.R. REP. NO. 83-1693, at 1-2 (1954).

The Executive Branch has also consistently acknowledged that tradition. Presidents from John Adams to William Henry Harrison, from Calvin Coolidge to John F. Kennedy, have insisted that our government is a limited one, bound to respect the inalienable rights of its people. President Kennedy is a good example. In his *Inaugural Address* he explained: "[T]he same revolutionary beliefs for which our forbears fought are still at issue around the globe—the belief that the rights of man come not from the generosity of the state, but from the hand of God." John F. Kennedy, Inaugural Address (Jan. 20, 1961), *reprinted in* LOTT, *supra*, at 306, 306.

This Court's oft-quoted line in *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), that our institutions presuppose a Supreme Being likewise makes sense only in that context.

In sum, all three branches of our federal government have long recognized the premise from which Jefferson argued his Declaration of Independence, namely that our freedom is grounded in an authority higher than the State. The Ninth's Circuit's judgment is fundamentally at odds with that principle. If reciting the Pledge is unconstitutional simply because it refers to a nation "under God," then reciting the Declaration of Independence, which refers to the Creator as the source of rights, is surely cast in doubt. And that would mean that publicly acknowledging the traditional grounding of our rights itself arguably violates those very rights. That would be an earthquake in our national ethos—one that should not be endured merely at the behest of the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

The judgment below threatens not only one patriotic rite and one particular federal statute. It challenges the American principle that fundamental rights are inalienable by the State precisely because they exist prior to the State. This is a sea-change in our nation's self-understanding that should not be ordered merely by a decision of the Ninth Circuit without further review by this Court.

At least since the Declaration of Independence was written, our national ethos has held that we have inalienable rights that the State cannot take away, because the source of those inalienable rights is an authority higher than the State. The Pledge, like the Declaration, is a statement of political philosophy, not of theology. Nevertheless, it is a statement of political philosophy that depends for its force on the premise that our rights are only inalienable because they inhere in a human nature that has been "endowed" with such rights by its "Creator."

All three branches of our federal government—including the Congress that inserted the words "under God" into the Pledge—have stood consistently and continuously in that tradition. As Congressman Wolverton observed in urging the inclusion of "under God" in the Pledge,

> Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that every human being has been created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. Thus, the inclusion of God in our pledge of allegiance . . . sets at naught the communistic theory that the State takes precedence over the individual . . . .

100 CONG. REC. 7336 (1954) (statement of Rep. Wolverton).

The proponents of adding the phrase "under God" to the Pledge were conscious not only of that tradition generally,[2] but

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[2] This Court has often rehearsed in considerable detail how the Framers did not view references to or invocations of God as an "establishment" of religion. *See, e.g., County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 671-73 (1989) (opinion of Kennedy, J.); *Lynch v. Donnelly*, 465 U.S. 668, 675-78 (1984); *Marsh v. Chambers*, 463 U.S. 783, 792 (1983). Government expression may *acknowledge* or *reflect* the broader culture, including its religious elements, *Marsh*, 463 U.S. at 792 (permitting government religious expression as "acknowledgment of beliefs widely held among the people of this country"), as long as it does not *establish* religion. That is, government may freely recognize the role of religion in society, so long as it does not proselytize for or "endorse" it. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 306-08 (2000). Indeed, there "is an unbroken history of official acknowledgment by all three branches of

also of the exigencies of their historical moment. As the court below conceded, a prime reason the words "under God" were inserted into the Pledge was to distinguish this country from the Soviet Union.[3] But this was not some jingoistic exercise in contrasting good believers with bad atheists. It was a serious reflection on the different visions of human nature, and therefore of human freedom, that underlay the two systems. Representative Louis Rabault, who first proposed the change in the House of Representatives, explained his motivation:

> My reason for introducing this resolution may be very briefly stated. The most fundamental fact of this moment of history is that the principles of democratic government are being put to the test. The theory as to the nature of man which is the keystone in the arch of American Government is under attack by a system whose philosophy is exactly the opposite.
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> . . .
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> . . . Our political institutions reflect the traditional American conviction of the worthwhileness of the individual human being. That conviction is, in turn, based on our belief that the human person is important because he has been created in the image and likeness of God and that he has been endowed by God with certain inalienable rights which no civil authority may usurp.

100 CONG. REC. 5750 (1954). The House Report likewise echoed that idea:

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government of the role of religion in American life from at least 1789." *Lynch*, 465 U.S. at 674.

[3] The legislative history is replete with references to "times such as these," 100 CONG. REC. 7336 (1954) (statement of Rep. O'Hara); "communism," *id.* at 7332 (statement of Rep. Bolton); "the conflict now facing us," *id.* at 7333 (statement of Rep. Rabaut); "a time in the world," *id.* at 7338 (statement of Rep. Bolton); and "this moment in history," *id.* at 5750 (statement of Rep. Rabault).

> At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual.

H.R. REP. NO. 83-1693, at 1-2 (1954); *see also* S. REP. NO. 83-1287, at 2 (1954) (describing similar sentiments of Senator Ferguson, author of the Senate proposal); 100 CONG. REC. 7332 (1954) (statement of Rep. Bolton).

In short, the political philosophy through which the Congress viewed the world when it amended the Pledge was traditionally and quintessentially Jeffersonian.[4] It contended simply that people who recognize a higher power than the State live in greater freedom.[5] By adopting the phrase "under God" in

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[4] The Declaration of Independence is not the only evidence of Jefferson's consistent argument that God was the source of inalienable rights. For example, shortly before drafting the Declaration of Independence, Jefferson wrote: "The God who gave us life gave us liberty at the same time; the hand of force may destroy, but cannot disjoin them." Thomas Jefferson, On the Instructions Given to the First Delegation of Virginia to Congress, in August, 1774, *reprinted in* 1 THE WRITINGS OF THOMAS JEFFERSON 181, 211 (Albert Ellery Bergh ed., 1904). Later, he questioned: "Can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God?" Thomas Jefferson, Notes on Virginia, Query XVIII (1782), *reprinted in* 2 THE WRITINGS OF THOMAS JEFFERSON, *supra*, at 1, 227.

[5] The House Report quotes from two men who helped shape this country early in its history. William Penn said, "'Those people who are not governed by God will be ruled by tyrants.'" H.R. REP. NO. 83-1693, at 2 (1954); *see also* 100 CONG.

the Pledge, Congress explicitly sought to draw a distinction between Madison and Jefferson's "natural rights" philosophy, on which the U.S. system is based, and the Soviet view that rights, such as they are, are conferred at the pleasure of the State.[6]

The Executive Branch has also followed that tradition.[7]

REC. 7333 (statement of Rep. Oakman (quoting William Penn)). George Mason explained: "'All acts of legislature apparently contrary to the natural right and justice are, in our laws, and must be in the nature of things considered as void. The laws of nature are the laws of God, whose authority can be superseded by no power on earth.'" H.R. REP. 83-1693, at 2 (1954); *see also* 100 CONG. REC. 7333 (statement of Rep. Oakman (quoting George Mason)).

[6] The Soviet Union, happily, is a threat no more. And the particular urgency the Congress perceived in the Cold War has passed. Nonetheless, the underlying principle of the inalienability of rights remains fundamental to our tradition. Moreover, the present moment is not without its own exigencies, as we engage an entirely different enemy who denies, for different reasons, that liberty is a right given us by the Creator.

[7] For example, Presidents have said the following:

"[M]ay that Being who is supreme over all, the Patron of Order, the Fountain of Justice, and the Protector in all ages of the world of virtuous liberty, continue His blessing upon this nation . . . ." John Adams, Inaugural Address (Mar. 4, 1797), *reprinted in* DAVIS NEWTON LOTT, THE PRESIDENTS SPEAK: THE INAUGURAL ADDRESSES OF THE AMERICAN PRESIDENTS FROM GEORGE WASHINGTON TO GEORGE WALKER BUSH 10, 15 (M. Hunter & H. Hunter eds., 2002).

"We admit of no government by divine right, believing that so far as power is concerned the Beneficent Creator has made no distinction amongst men; that all are upon an equality . . . ." William Henry Harrison, Inaugural Address (Mar. 4, 1841), *reprinted in* LOTT, *supra*, at 81, 82.

"It is . . . for us to be here dedicated to the great task remaining before us . . . that this nation, under God, shall have a new birth of freedom and that government of the people, by the people, for the people, shall not perish from the earth." Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), *reprinted in* 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 23, 23 (Roy P. Basler ed., 1953).

"I leave you, hoping that the lamp of liberty will burn in your bosoms until there shall no longer be a doubt that all men are *created free and equal*." Abraham Lincoln, Speech at Chicago, Ill. (July 10, 1858) (emphasis added), *reprinted in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra*, at 484, 502.

This Court has itself reflected and reinforced the tradition that the source of inalienable rights is above the State. That is the very real insight in what is too often assumed to be a throw-away line by Justice Douglas: Our "institutions" do indeed "presuppose a Supreme Being," *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), because they presuppose the existence of a source of rights that is prior to the State.

"Our government rests upon religion. It is from that source that we derive our reverence for truth and justice, for equality and liberty, and for the rights of mankind. Unless the people believe in these principles they cannot believe in our government. There are only two main theories of government in the world. One rests on righteousness, the other rests on force. One appeals to reason, the other appeals to the sword. One is exemplified in a republic, the other is represented by a despotism." Calvin Coolidge, Speech at the Unveiling of the Equestrian Statue of Bishop Francis Asbury (Oct. 15, 1924), *reprinted in* CALVIN COOLIDGE, FOUNDATIONS OF THE REPUBLIC: SPEECHES AND ADDRESSES 149-50 (1968).

"The American people stand firm in the faith which has inspired this Nation from the beginning. We believe that all men have a right to equal right to justice under law and equal opportunity to share in the common good. We believe that all men have the right to freedom of thought and expression. We believe that all men are created equal because they are created in the image of God." Harry S. Truman, Inaugural Address (Jan. 20, 1949), *reprinted in* LOTT, *supra*, at 280, 289.

"[T]he same revolutionary beliefs for which our forbears fought are still at issue around the globe—the belief that the rights of man come not from the generosity of the state, but from the hand of God." John F. Kennedy, Inaugural Address (Jan. 20, 1961), *reprinted in* LOTT, *supra*, at 306, 306.

"We are a nation under God, and I believe God intended for us to be free." Ronald Reagan, First Inaugural Address (Jan. 20, 1981), *reprinted in* LOTT, *supra*, at 340, 344.

"[M]ay He continue to hold us close . . . one people under God, dedicated to the dream of freedom that He has placed in the human heart, called upon now to pass that dream on to a waiting and hopeful world." Ronald Reagan, Second Inaugural Address (Jan. 20, 1985), *reprinted in* LOTT, *supra*, at 345, 350.

"[W]e have always instinctively sensed that God's purpose was bound up with the cause of liberty. The Founders understood this. As Jefferson put it, 'Can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God?'" George H.W. Bush, Remarks to the National Association of Evangelicals in Chicago, Ill. (Mar. 3, 1992), *available at* http://bushlibrary.tamu.edu/papers/1992/92030301.html.

The decision below is at war with that tradition. If reciting the Pledge is now unconstitutional because it refers to a nation "under God," then reading aloud the Declaration of Independence, which refers to the Creator as the source of our rights, must at least be suspect. That turns the American theory of rights exactly on its head. Such a drastic change in our national ethos must not be undertaken merely at the instigation of the Ninth Circuit, but warrants instead review by this Court.

CONCLUSION

For the foregoing reasons, the writ should be granted.

Respectfully submitted,

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